Supreme Court, U.S.
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No. 97-282

In the Supreme Court of the United States

OCTOBER TERM, 1997

BETH ANN FARAGHER,
Petitioner,

v.

THE CITY OF BOCA RATON,
a political subdivision of the State of Florida,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENT THE CITY OF BOCA RATON

FRANK BARTOLONE
City Attorney
THE CITY OF BOCA RATON
201 West Palmetto Park Road
Boca Raton, FL 33432

HARRY A. RISSETTO
PETER BUSCEMI
Counsel of Record
MARK S. DICHTER
MARK A. SRERE
VICTORIA E. HOUCK
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
Counsel for Respondent The City of Boca Raton

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QUESTION PRESENTED

Whether in a hostile-environment sexual harassment case an employer can be held liable for discrimination under Title VII on the basis of conduct by low-level supervisors that was outside the scope of their employment, where the employer neither knew nor should have known of the conduct, where the supervisors did not exercise any supervisory authority to aid or facilitate the harassment, and where there was prompt remedial action taken when the employer did learn of the conduct.

LIST OF PARTIES

In addition to the parties named in the caption, the other parties in the court of appeals were plaintiff-appellant and cross-appellee Nancy Ewanchew and defendant-appellees William Terry and David Silverman.

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BRIEF FOR RESPONDENT THE CITY OF BOCA RATON

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-40a) is reported at 111 F.3d 1530. The order vacating the panel opinion is reported at 83 F.3d 1346. The panel opinion (Pet. App. 41a-68a) is reported at 76 F.3d 1155. The opinion of the district court (Pet. App. 69a-104a) is reported at 864 F. Supp. 1552.

STATUTE INVOLVED

This case concerns Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 253, 255, which provides:

It shall be an unlawful employment practice for an employer—

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual

> with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (1994 ed.).

STATEMENT OF THE CASE

A. Underlying Facts

In five years of working for the City of Boca Raton, from September 1985 through June 1990, petitioner Beth Ann Faragher never complained to anybody in the City's management about the existence of unwelcome or unwanted conduct by any of her supervisors or co-employees. Petitioner made no such complaint even though she knew, as early as the Fall of 1989, that she would be leaving employment with the City to go to law school. J.A. 196-98. Petitioner did not make any complaint of her own even after former lifeguard Nancy Ewanchew submitted a letter complaining of sexual harassment in April 1990, and even after Ewanchew urged petitioner to do so as well. Indeed, Faragher still refused to come forward even after she knew that the City was conducting an investigation as a result of Ewanchew's complaint, and even after she reviewed the City's revised sexual harassment policy, which was distributed in May 1990, and which explicitly urged employees to report offending conduct. Trial Testimony, June 22, 1994, 213-15; J.A. 269-72. Faragher did not come forward at any time of her own volition; instead, the City's Director of Personnel and Labor Relations, Richard Bender, initiated contact with her as part of the investigation that the City conducted after receipt of Ewanchew's letter. J.A. 256. That investigation led to immediate disciplinary action against William Terry and David Silverman, the two City employees who acted inappropriately. Pet. App. 80a.[1]

[1] Petitioner never told either Terry or Silverman that she found their conduct offensive. J.A. 196, 198. Nor did she tell the other captains (who were not alleged to have engaged in sexual harassment) that she was offended by Terry's and Silverman's conduct. J.A. 196-97; 263-64.

Ewanchew's April 23, 1990 letter to Bender marked the first time that the City learned of any allegations of sexual misconduct by its employees in this case. J.A. 248-49; Pet. App. 81a. The letter was written more than a year after Ewanchew left employment with the City. Pet. App. 83a. Ewanchew wrote only the one letter and directed it specifically to Bender. Promptly after receiving the letter, Bender met with Ewanchew, investigated her allegations, and reprimanded and punished Terry and Silverman. In particular, Terry forfeited 160 hours of annual leave, and Silverman forfeited 40 hours of annual leave. Pet. App. 80a. The district court found "that the City acted with dispatch to investigate Terry's conduct and to discipline him after confirming that he had indeed engaged in inappropriate behavior." Pet. App. 102a-103a. There is no allegation that any employee or ex-employee of the City of Boca Raton ever experienced retaliation for complaining of sexual harassment or unwelcome conduct.[2]

Petitioner worked as an ocean lifeguard for the City of Boca Raton from September 1985 until June 1990. J.A. 167. She worked with Terry and Silverman during her entire tenure at the beach. J.A. 193. For her first three years of employment with the City, Faragher worked part-time during the school year, returning each fall to the same position at the beach after taking leaves of absence for the summers. J.A. 191. After her first season, in July 1986, petitioner wrote to Terry telling him that she was looking forward to returning to the beach. J.A. 295. In 1988, after graduation from college, she took a

[2] Before Ewanchew's letter, there were no complaints of sexual harassment occurring at the beach. There was, however, one other incident at most marginally related to this subject matter. In 1986, Mr. Calhoun, a lieutenant at the beach, was disciplined for "mooning" the other lifeguards during a meeting. J.A. 249-52; 285-90. There was no allegation that the woman lifeguard, Carol LaRue, who was involved in the complaint regarding that incident experienced any retaliation.

full-time position in retail sales. Thereafter, petitioner quit that position and was re-employed at the beach full time. She never sought alternative employment because she enjoyed her job at the beach. J.A. 192-93. Moreover, Faragher did not discourage her sister from applying for a job as a Boca Raton ocean lifeguard. J.A. 198. Faragher did not discuss sexual harassment with her good friend Kelly Evans, who was another female lifeguard in the City's employ. J.A. 261; *see* Pet. App. 78a, 90a. Nor did Faragher ever complain to other female lifeguards about Terry's or Silverman's inappropriate conduct. Pet. App. 90a. Petitioner resigned her job in 1990 to attend law school. Her decision to leave was unrelated to her work environment. Pet. App. 72a-73a.

The City's ocean lifeguards were part of the Marine Safety Section of the City's Parks and Recreation Department. The Chief of the Section was directly supervised by the Recreation Superintendent,[3] and the Recreation Superintendent reported to the Director of Parks and Recreation. The Director of Parks and Recreation reported to the City Manager. Within the Marine Safety Section's chain of command, lifeguards reported to lieutenants, and above them to captains. The captains in turn reported directly to the Chief of the Marine Safety Section. Pet. App. 71a. Marine Safety Headquarters "was far enough away from City Hall as to constitute a remote location." Pet. App. 84a; *see also id.* at 16a ("The lifeguards were stationed at a remote location and had little contact with City officials.").

During the time that Faragher worked as a lifeguard, Terry served as Chief of the Marine Safety Section and

[3] Lorraine Gardner was Recreation Superintendent from 1974 until 1988, and Sandra Dioli-Kumm held the position from 1988 to 1989. Pet. App. 71a-72a. Faragher did not complain to either one about Terry's conduct. J.A. 240-42; 234-36; Trial Testimony, June 22, 1994, 207-08. Ewanchew met with Dioli-Kumm to discuss other work-related issues on several different occasions, but failed to complain about any hostile work environment. Pet. App. 81a.

Silverman served first as a Marine Safety lieutenant and then as a captain. The district court explicitly found that neither Terry nor Silverman "had the standing necessary to qualify as higher management for the City." Pet. App. 71a; *see also id.* at 84a. Petitioner does not challenge this finding. As Chief of the Section, Terry had the authority to supervise all aspects of the lifeguards' work assignments; to give oral reprimands and place reports of disciplinary actions in personnel files; and to interview and select new lifeguards, subject to approval by higher management. Pet. App. 92a. As lieutenant and later as captain, Silverman supervised the lifeguards' daily duties, including designating work assignments and supervising physical fitness routines. *Id.*

At any given time during the period of petitioner's employment, there were usually four to six female lifeguards out of a total of 40 to 50 lifeguards. Because of limited facilities, the lifeguards shared one small locker room and shower. The work environment at the beach was somewhat boisterous and rambunctious. The guards shared a sense of camaraderie with one another. Pet. App. 72a. Some teasing, sexual banter, and off-color language was not unusual among the guards in the locker room, and both male and female lifeguards participated. J.A. 122; 152-54; 193-96; 235-36; 244-45; 259-60. Many of the lifeguards also socialized with one another outside of the workplace. J.A. 157.

During the course of Faragher's five years of employment as a lifeguard, Marine Safety Chief Terry touched her shoulders or waist on a number of occasions, patted her thigh once in April 1990, and slapped her on the buttocks once. Pet. 5. Faragher did not see Terry touch any other lifeguard inappropriately. Faragher testified that she never heard Terry use any offensive or vulgar language.[4] Trial Testimony, June 22, 1994, 226.

[4] Petitioner's testimony as to the complete absence of offensive language from Terry was echoed by two other female lifeguards, Gail Nye, J.A. 231, and Kelly Evans, J.A. 259, as well as by Janet

Kelly Evans, a lifeguard from 1984 to 1988, testified that she did not witness or experience any offensive touching by Terry. J.A. 258-59. Some other lifeguards testified to isolated incidents of touching by Terry. To catalogue those instances: Jamie Harrington, who worked as a lifeguard for more than five years, testified that Terry touched her once, on her thigh. She further stated that when he did it, she punched him in the arm and he never touched her again. J.A. 133-34. Victoria Bonner, who worked from 1989 to 1992, also testified that Terry touched her once on the thigh. J.A. 158. She did not see Terry touch any other guard. J.A. 159-60. Beverly Barta, who worked full-time from January to April 1989 and then part-time until 1992, testified about two incidents in which Terry grabbed her buttocks after a morning meeting. J.A. 200. She did not see Terry touch any other lifeguard inappropriately. J.A. 202-03. Ewanchew described two specific incidents in which Terry touched her in a sexually offensive manner. Pet. 5. Gail Nye testified that the only touching by Terry was an arm around her shoulder or hip, which occurred a half dozen times. Nye acknowledged that this conduct might seem innocent to a casual observer, although it made her uncomfortable. Trial Testimony, June 23, 1994, 116-18.

The district court found that Silverman made an offensive comment to Faragher, that on one occasion he made an offensive pantomime gesture in her presence, and that

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Chisesi, the Marine Safety clerk-typist from 1984 to 1987, Trial Testimony, June 23, 1994, 148, and Kathryn Buhr, a secretary in the Marine Safety office from November 1989 to September 1990. J.A. 161-63. Other female lifeguards testified as to some infrequent inappropriate remarks by Terry. Jamie Harrington recalled two incidents of foul language and one inappropriate remark, J.A. 125-26, 130, and Victoria Bonner heard one remark from Terry that she characterized as offensive, and she testified that one of the lifeguard lieutenants told her that Terry made another inappropriate remark. J.A. 154-56. As to Ewanchew's testimony about remarks by Terry, the district court found that "his remarks in Ewanchew's presence were more directed toward other women." Pet. App. 74a.

he once tackled her. Pet. App. 76a. After Silverman became a captain, "he cleaned up his act," and did not engage in any additional offensive conduct. J.A. 131-32, 138. Bonner, who joined the lifeguards shortly before Silverman made captain, testified that she had "no problems with Silverman." J.A. 160. Harrington recalled only two crude remarks by Silverman during her five-year tenure. J.A. 138. Nye recalled two instances of inappropriate comments by Silverman. Trial Testimony, June 23, 1994, 114-15. Barta stated that Silverman often used vulgar language and recalled overhearing one inappropriate sexual remark directed at another woman lifeguard. J.A. 201. Evans testified to one crude comment by Silverman that did not bother her. Pet. App. 78a.

Prior to Ewanchew's letter of complaint in April 1990, the lifeguards generally did not discuss with each other their experiences with Terry or Silverman. J.A. 132-33; 159; 205-06; Trial Testimony, June 24, 1994, 46-47. Faragher did speak about Terry's and Silverman's conduct with former Marine Safety lieutenant and later training captain Robert Gordon. It is not clear from the record when this occurred; indeed, Faragher's conversation with Gordon may have occurred *after* Ewanchew's letter to the City's Director of Personnel in April 1990. Trial Testimony, June 22, 1994, 5-6; *id.* at 213-14. Other female lifeguards also complained to Gordon about Terry's and Silverman's language and conduct. The lifeguards did not speak with Gordon on a subordinate to superior basis; they spoke with him as a friend whom they held in high regard. Pet. App. 82a. Gordon did not report the complaints to his supervisor, Terry, or to any other City official. *Id.* The district court found that, like Terry and Silverman, Gordon did not have the standing necessary to qualify as higher management for the City. Pet. App. 71a. The court therefore did not impute to the City Gordon's knowledge of the complaints by Faragher and other lifeguards about Terry and Silverman. Pet. App. 84a.

The City had a written sexual harassment policy that was promulgated on February 26, 1986. The policy was

contained in a memorandum from the City Manager addressed to all employees. J.A. 267-68. Although Richard Bender, the City's Director of Personnel, testified that the memorandum was "distributed to the departments for posting and issued with paychecks to City employees," J.A. 253, the district court found that the City failed to disseminate the policy among Marine Safety Section employees. Pet. App. 83a. The City revised and reissued its policy in May 1990 (not as a result of Ewanchew's letter). J.A. 253-55; 269-72. Faragher received and reviewed a copy of the revised policy in May 1990. J.A. 188.

B. Proceedings In The District Court

On January 6, 1992, more than a year and a half after Terry's and Silverman's discipline, Faragher and Ewanchew filed suit against the City of Boca Raton, Terry, and Silverman. After a non-jury trial, the district court returned a mixed decision. The court found Terry and Silverman liable to Faragher under 42 U.S.C. § 1983, Pet. App. 99a, but it ruled in favor of Terry and Silverman on Ewanchew's Section 1983 claim, finding that Ewanchew "did not perceive the environment as abusive." Pet. App. 101a. The court found Terry liable to both Faragher and Ewanchew on their claims of battery. Faragher was awarded $10,000 in compensatory damages against Terry and Silverman, jointly and severally, and she was awarded $500 in punitive damages against Terry. Ewanchew was awarded $35,000 in compensatory damages and $2,000 in punitive damages against Terry alone. Pet. App. 103a-104a.

The district court rejected Faragher's and Ewanchew's common-law claims that the City had negligently retained and supervised Terry. The court based its dismissal of these claims on its finding that the City had no actual or constructive notice of Terry's conduct. Pet. App. 102a-103a. The court held: "Applying the standard of a reasonable employer to the City, the Court finds insufficient proof to establish that the City should have become aware of problems with Terry's conduct prior to Ewanchew's

letter." Pet. App. 103a. Petitioner has not sought review in this Court with respect to the dismissal of her common-law claims against the City.

With respect to Faragher's Title VII claims against the City, the district court found the City liable and awarded Faragher $1 in nominal damages.[8] Pet. App. 103a. By separate order dated March 27, 1995, the district court held the City, Terry, and Silverman jointly and severally liable for Faragher's attorneys' fees. J.A. 96-98.

The court ruled that Terry's and Silverman's conduct was sufficiently severe or pervasive to create a hostile working environment for Faragher, despite what the court referred to as "Faragher's attenuated reaction to such environment." Pet. App. 90a. More specifically, the court stated:

> The effect of the environment created by Terry's and Silverman's conduct upon Faragher is more *difficult to quantify*. Based on Faragher's testimony, the Court has no doubt that Faragher neither invited nor appreciated her supervisors' conduct. Faragher, however, seems to have gone about her business despite such conduct without complaining to anyone except Gordon. Indeed, Faragher does not appear to have found the Marine Safety Section atmosphere sufficiently adverse to caution her own sister against applying for a position there. Faragher's position as a part-time and summer employee, and her concomitant college studies, may help explain her *apparent nonchalance* regarding the environment created by Terry and Silverman. Moreover, Faragher does not

[8] Faragher had originally brought a Title VII claim against Terry and Silverman individually, and she sought joint and several compensatory damages, as well as declaratory and injunctive relief, against all three defendants. By pre-trial order dated August 13, 1992, the court struck the claim for compensatory damages against the City (because all of the events at issue occurred before enactment of the Civil Rights Act of 1991, *see Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)), struck the request for declaratory and injunctive relief, and dismissed the claim against Terry and Silverman individually. J.A. 76-77.

> appear to have been exposed as much as Ewanchew to overt physical acts by Terry.

Pet. App. 90a (emphasis added).[6] With respect to the City, the court expressly stated that "[t]he Court *does not* find that the City's management knew of the respective acts complained of by Faragher and Ewanchew prior to Bender's receipt of Ewanchew's letter." Pet. App. 84a (emphasis by the court).

The City has always urged—and continues to urge—that the improper conduct of its supervisors that was directed at, or witnessed by, Faragher during her five years of intermittent employment as a lifeguard was, as a matter of law, not " 'sufficiently severe or pervasive to alter the conditions of [Faragher's] employment and create an abusive working environment.' " *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (*quoting Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). The district court, however, not only rejected the City's position as to the existence of a hostile working environment but it also held the City liable for that environment under Title VII. The court relied on three alternative theories that it ruled provided a basis for liability despite the court's finding that the City had no actual knowledge of Terry's and Silverman's harassment.

First, the district court ruled that Terry's and Silverman's behavior was not only sufficiently pervasive to create a hostile work environment but that the same finding of "pervasiveness" was also sufficient to support "an inference of knowledge, or constructive knowledge" on the part of the City. Pet. App. 92a. The court reached this conclusion even though, in rejecting Faragher's and Ewanchew's common-law negligent retention claims against the

[6] Oddly, the district court concluded in a single opinion that Ewanchew "did not perceive the environment as abusive," Pet. App. 101a, that Faragher was not exposed as much as Ewanchew to overt physical acts by Terry, Pet. App. 90a, but that Faragher nevertheless was subject to an environment that altered the conditions of her employment and "unreasonably interfered with [her] work performance . . . ." Pet. App. 89a, 90a.

City, it found that the City had no actual or constructive notice of Terry's conduct. Pet. App. 102a-103a.

Second and third, the court held that, taking into consideration the "overall workplace structure," as well as the supervisory authority of Terry, Silverman, and Gordon, all three men were acting as "agents of the City." Because Terry and Silverman were acting as agents of the City, the court held, the City is "directly liable" under Title VII even in the absence of any actual or constructive notice to the City of the harassing conduct. Pet. App. 93a. Similarly because Gordon was acting as an "agent of the City" in failing to report the complaints brought to him, the court concluded that liability could be imputed to the City based on the agent's knowledge and inaction. *Id.* The court did not find that Terry's and Silverman's supervisory authority over Faragher contributed to or facilitated the harassment. *Id.*

C. The Decision Of The Court Of Appeals Panel

Faragher and Ewanchew appealed, and the City cross-appealed.[7] A panel of the court of appeals reversed the district court's ruling against the City on Faragher's Title VII claim and otherwise affirmed. The panel concluded that, although Terry and Silverman had created a hostile work environment for Faragher, none of the district court's alternative theories for holding the City liable under Title VII was meritorious.

Addressing first that portion of the district court's decision that focused on Terry's and Silverman's supervisory authority and the structure of the Marine Safety Section workplace, the panel observed that petitioner did not contend, and that the record in any event would not support a contention, that Terry and Silverman acted within the scope of their employment when they harassed Faragher. Pet. App. 59a, 63a. Nor was there evidence that Terry's and Silverman's exercise of their supervisory authority

[7] Faragher and Ewanchew appealed the district court's ruling that the City was not liable on the plaintiffs' claim alleging negligence in the City's retention and supervision of Terry.

somehow aided or facilitated their harassment of Faragher. Pet. App. 63a-64a & n.14. The panel ruled that Terry and Silverman did not invoke their authority over petitioner when they engaged in their harassment and that therefore the district court erred in relying on the structure of the Marine Safety Section workplace as a basis for Title VII liability. Pet. App. 61a-63a.

The panel similarly rejected that portion of the district court's decision that based Title VII liability on Gordon's failure to report Terry's and Silverman's sexual harassment. Noting the district court's finding that Gordon did not rank as higher management, and that notice to him could not be imputed to the City, the panel held that the district court erred in concluding that Gordon's knowledge regarding Terry's and Silverman's conduct provided a basis for holding the City liable. Pet. App. 66a & n.16. The panel stressed that, as the district court found, "Gordon did not receive that information as the City's agent; he received it as someone held in high repute by his colleagues." *Id.; see also* Pet. App. 82a.

Finally, the panel rejected the district court's ruling that the pervasiveness of Terry's and Silverman's harassing behavior was in and of itself sufficient to give the City constructive notice of their wrongful conduct. Although the panel was prepared to assume that "[t]here may be cases in which it is difficult to draw the line where conduct becomes so pervasive that the employer should have known about it," the court held that "this is not such a case." Pet. App. 67a. The court observed that the district court had expressly found that the City had no actual knowledge of Terry's and Silverman's conduct. *Id.* The court also noted that neither the district court nor Faragher had identified any factual basis in the record to conclude that the City should have known of Terry's and Silverman's conduct. *Id.*

D. The Decision Of The En Banc Court Of Appeals

In response to Faragher's petition for rehearing, the court of appeals vacated the panel decision and heard the

case en banc. The only issues discussed by the en banc court concerned the question of the City's liability under Title VII. In all other respects, the en banc court affirmed the decision of the district court. Pet. App. 5a n.3.

The en banc court declared that it would address the following two issues:

> (1) whether the City may be liable under Title VII for Terry's and Silverman's hostile environment sexual harassment of Faragher, regardless of its actual or constructive knowledge of that harassment; and
>
> (2) whether the City knew or should have known of Terry's and Silverman's hostile environment harassment of Faragher.

Pet. App. 5a. On both issues, the en banc court concluded, like the panel, that the City was not liable.

The principal difference between the en banc decision and the panel decision was that the en banc court switched the way in which the labels "direct" and "indirect" were used to refer to the different theories of the City's liability. Following the Restatement (Second) of Agency § 219 (1958), the en banc court used the term "direct" to refer to liability based on the theory that the City knew or should have known about Terry's and Silverman's wrongdoing, and failed to take appropriate corrective action. The court used the term "indirect" to refer to liability based on the theory that the harassment occurred within the scope of the supervisor's employment or that the supervisor's agency relationship with the City somehow aided or facilitated the supervisor's harassment of his subordinate, and that the City therefore could be liable on a vicarious basis, without any showing of fault. Pet. App. 7a-8a & n.4.

The en banc court turned first to the question of whether the City could be held indirectly liable for Terry's and Silverman's harassing behavior. The court stated that "[t]his case presents the archetypical example of employees stepping outside of the scope of their employment and seek-

ing to further personal ends." Pet. App. 12a. It further observed that "[n]o person threatened to fire or demote Faragher for refusing to accommodate Terry's and Silverman's harassing overtures" and that "Terry and Silverman were not aided in accomplishing the harassment by the existence of any agency relationship with the City." Pet. App. 13a-14a. The court also stressed that "there is no evidence that either Terry or Silverman made any employment decisions based upon Faragher's response to their sexual overtures." Pet. App. 13a. For all these reasons, the court held that the City could not be held liable on an indirect liability theory. Like the panel and like this Court in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), the en banc court refused to impute sexual harassment liability to an employer merely because the harasser possessed supervisory or disciplinary authority over the person who was being harassed.

On the issue of direct liability, the en banc court ruled that "the district court clearly erred in finding that the City's knowledge may be inferred from the fact that the conduct was pervasive enough to create an abusive work environment." Pet. App. 17a. Although the en banc court said that there may be cases in which harassing conduct becomes so pervasive that the employer should have known about it, it held that this case does not fall in that category. Pet. App. 16a-17a. The court commented that neither Faragher nor the district court identified any factual basis for concluding that the City should have known about the misconduct. The court also held that Faragher's complaints to Gordon did not provide a basis for holding the City directly liable, since Gordon did not occupy a higher management position and, in any event, he received the complaints not in his capacity as an agent of the City but as a friend of Faragher and other lifeguards. Pet. App. 15a & n.9.

SUMMARY OF ARGUMENT

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), this Court explicitly held that the court of appeals had "*erred* in concluding that employers are always automatically liable for sexual harassment by their supervisors." *Id.* at 72 (emphasis added). The Court then directed the lower courts to turn to common-law agency principles for guidance in determining when and under what circumstances an employer will be held liable under Title VII for sexual harassment by one or more of its supervisory personnel. Petitioner does not take issue with the holding in *Meritor* that employers are not strictly liable for their supervisors' sexual harassment. Nevertheless, petitioner has urged this Court to adopt a test that rests on the victim's fear of retaliation if she complains—a test that will result in automatic liability in cases in which the harasser is a supervisor. Petitioner's test is inconsistent with both *Meritor* and common-law agency principles.

In cases of hostile-environment sexual harassment such as this one, the proper standard of employer liability is negligence, regardless of whether the harasser was a supervisor or co-worker of the plaintiff. A review of common-law agency principles illustrates that negligence—not vicarious liability—generally is the proper standard of liability for cases of hostile-environment sexual harassment. Moreover, a negligence standard best supports the policies underlying Title VII.

In addition to her proposed "fear of retaliation" test, petitioner seeks to create one or more per se rules for imposing liability on an employer. In particular, petitioner contends that actual notice to any employee in any supervisory role constitutes actual notice to the employer, regardless of what level of authority the supervisor may occupy; what his duties and responsibilities are; what, if any, relationship he may have to the alleged harassment; and in what capacity and under what conditions he may have learned of the alleged harassment. Such a rule assumes lines of reporting and responsibility that typically do not exist in the workplace. If adopted, it would place a premium on ambush and surprise, while

at the same time deterring the effective communication necessary to deal with the problem of hostile-environment harassment. An employee would enhance the prospects of her planned litigation, while at the same time not affording her employer any realistic opportunity to address the situation, if she were to notify a subordinate supervisor instead of higher management empowered to deal with the alleged problem.

Petitioner's second proposition mixes apples and oranges. The "severity" and "pervasiveness" that suffices to create a hostile environment for a specific employee does not necessarily have any bearing on what the employer knew or should have known. As the district court's different rulings with respect to the claims of Faragher and Ewanchew show, the existence of a hostile work environment depends not only on the objective perspective of the "reasonable employee" but also on the subjective view of an individual plaintiff. The considerations that bear on whether an individual plaintiff actually and reasonably perceived her work environment as hostile are quite different from those that relate to whether the employer should have known about sexual harassment in the workplace. Petitioner's second proposition invites the Court to conflate the two inquiries and thus to repeat the error of the district court. As the court of appeals correctly held, that approach should be rejected.

Finally, petitioner would have this Court establish a per se rule that an employer's failure effectively to disseminate a sexual harassment policy means that the employer will be deemed to have constructive knowledge of whatever harassment may occur, regardless of the facts or circumstances involved. Title VII does not authorize such ad hoc judicial rulemaking, but, more important, the per se rule suggested by petitioner does not logically advance the antidiscrimination purposes of the statute. This is particularly apparent when it is recalled that the relevant events in this case occurred between 1985 and 1990, before the EEOC's own guidelines urged the dissemination of specific sexual harassment policies to employees. Petitioner's proposed rule is nothing more than a device for arbitrarily expanding employer liability. It should not be adopted.

ARGUMENT

Employers are not automatically or strictly liable for sexual harassment by their supervisors. This Court has so held. *Meritor*, 477 U.S. at 72. To distinguish between employers that are liable under Title VII and those that are not, "Congress wanted courts to look to agency principles for guidance . . . ." *Id.* Although announcing this holding in *Meritor*, the Court also cautioned that "such common-law principles may not be transferable in all their particulars to Title VII . . . ." *Id.*

Under agency principles, an employer may be held liable for its *own* wrongs that result in harm to an employee through the acts of a supervisor. Specifically, an employer that authorizes or ratifies the sexually-harassing conduct of its supervisors, or that is negligent in relation to that conduct, can be held directly liable for its own acts or omissions.

In this case, there never has been a contention that the City authorized or ratified the sexually-harassing conduct of Terry and Silverman. In addition, both courts below found that the City did not know about Terry's and Silverman's conduct before Bender received Ewanchew's letter. Pet. App. 4a, 44a, 84a. Petitioner does not challenge this finding, and indeed has adopted it. Pet. 6. Accordingly, as the case comes to this Court, there is no issue of any direct involvement by the City in the wrongful conduct, nor is there any assertion that the City failed to react promptly and appropriately once informed of the harassment. Petitioner, in short, does not seek to impose Title VII liability on the basis of anything the City itself did or failed to do.

Instead, petitioner presents two different legal constructs by which she contends the City can be held liable under

Title VII. First, she argues for a form of vicarious liability, under which liability is imputed to the employer without fault, based on the acts of the supervisors. Second, she argues that, although the City did not know of Terry's and Silverman's wrongdoing, it should have known (or should be deemed to have known) on three separate grounds: the lifeguards' statements to Gordon,[8] the "pervasive" nature of the conduct found by the district court, and the ineffective dissemination of the City's sexual harassment policy to Marine Safety Section employees before 1990. Because the City should have known for one or more of these reasons, petitioner argues, the City should be held liable under Title VII for failing to stop the harassment prior to Ewanchew's complaint. As the court of appeals correctly held, both of petitioner's proposed routes to liability of the City are flawed. To demonstrate the errors in petitioner's position, we proceed as follows.

First, we address petitioner's vicarious liability argument. We show that the argument is, in reality if not in name, nothing more than an attempt to impose the same strict employer liability that this Court rejected in *Meritor*. We then explain why the vicarious liability advocated by petitioner is unsupported by either the "scope of employment" or the "apparent authority" line of cases decided under the common law of agency. Among other things, we observe that Faragher's effort to fit this case under the "apparent authority" rubric is the product of an unwarranted transfer to the present factual situation of Restatement language designed to describe and summar-

[8] As noted above, Faragher, in her petition for certiorari, explicitly adopted the finding of both courts below that the City did not know of Terry's and Silverman's misconduct prior to Ewanchew's letter of complaint. Now, however, Faragher says that, based on the lifeguards' statements to Gordon, the City had "actual knowledge" of the harassment. Pet. Br. 30-34. For the reasons set forth below, *see* pages 42-45, *infra*, petitioner's position is without merit, regardless of whether the statements to Gordon are characterized as a source of actual knowledge or constructive knowledge by the City.

ize common-law decisions arising from very different circumstances not applicable here. We also show that, even if the Court were to conclude, notwithstanding our argument, that some version of the "apparent authority" concept is relevant, petitioner still should not prevail, because neither Terry nor Silverman made any use of his supervisory authority to assist or facilitate his wrongful conduct.

Second, we examine common-law agency principles generally and conclude that, in the context of a hostile-environment sexual harassment case, employer liability under Title VII should arise only if it can be shown that the employer was reckless or negligent in allowing the misconduct to occur or to go uncorrected. We demonstrate that such a standard is not only the one properly derived from common-law agency decisions dealing with an agent's intentional torts but also the one that best reflects and implements the remedial purposes of Title VII.

Finally, we address petitioner's three proposed bases for finding that the City should have known, or should be deemed to have known, about Terry's and Silverman's misconduct. We show that none of petitioner's theories supports an inference of knowledge by the City sufficient to have imposed a duty to intervene before Ewanchew's letter to Bender.

I. UNDER COMMON-LAW AGENCY PRINCIPLES, THE CITY SHOULD NOT BE HELD VICARIOUSLY LIABLE IN THIS HOSTILE-ENVIRONMENT SEXUAL HARASSMENT CASE.

Although petitioner perfunctorily disclaims any intention to impose strict liability, Pet. Br. 21, petitioner's proposed basis for vicarious liability will result in de facto strict liability whenever a supervisor is the harasser. According to petitioner,

> [a]n employer is liable for the sexually hostile environment created by a supervisor under § 219(2)(d) of the Restatement, regardless of whether it knew or should have known of that behavior, if the super-

> visor was "aided in" perpetrating the harassment by the "existence" of the powers he possesses as a supervisor.

Pet. Br. 21 (footnotes omitted). Petitioner's own argument demonstrates why the test she advocates is tantamount to automatic liability: "In many cases, as here, the supervisor's powers over the terms and conditions of the victim's employment will facilitate that harassment because the victim reasonably believes that she is at risk of retaliation if she resists, objects to or complains about that harassment." *Id.* Because the relationship between a supervisor and a subordinate is by definition one in which the supervisor holds some job power over the subordinate, the inevitable result in these circumstances is that a victim always will have (or, at least, always will be able to claim that she has) the reasonable fear necessary to render an employer liable.

Indeed, petitioner explicitly sets forth what would be every plaintiff's argument if petitioner's rule were adopted:

> Supervisors typically exercise broad discretionary powers over their subordinates, determining many of the terms and conditions of their employment, including their raises and prospects for promotion and controlling or greatly influencing whether they are to be dismissed. Supervisors and subordinates alike understand full well that a subordinate who incurs the displeasure of her superior, even for entirely personal reasons, is likely to find her employment made unpleasant, if not terminated altogether.

Pet. Br. 24. According to petitioner, there is no requirement that the supervisor actually *use* his authority to effect or promote the harassment. As long as there is a "typical" supervisory relationship, the employer will be liable.[9]

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[9] The examples given by petitioner reinforce this conclusion: "In some cases, the supervisory power utilized may be the supervisor's ability to compel the subordinate to remain in his presence . . . ." Pet. Br. at 22 n.21; *see id.* at 26 n.30. A victim "who may need a future job reference from the employer in question may well refrain from complaining even just before or after she resigns, for fear that the supervisor in question would retaliate by giving her an adverse reference." *Id.* at 25 n.28. "The virtual nonexistence of cases in which subordinates sexually harass their supervisors reflects the fact that the actual or potential exercise of supervisory powers by the harassing supervisor often lies at the very heart of this misconduct." *Id.* at 26.

Petitioner's strict liability approach cannot be reconciled with *Meritor*. There the Court ruled that the court of appeals was wrong in holding an employer strictly liable for the hostile work environment created by a supervisor—a supervisor who, like Terry, was the head of a remote location. The Court further held that "Congress' decision to define 'employer' [in Title VII] to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some *limits* on the acts of employees for which employers under Title VII are to be held responsible."[10] 477 U.S. at 72 (emphasis added). Petitioner's test simply fails to limit liability in any meaningful way.[11] It also misapplies common-law agency principles, as we now show.

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[10] This observation was drawn from the brief of the Equal Employment Opportunity Commission ("EEOC"), which also remarked that Congress failed to use terms such as "subordinate" or "supervisory employee" when defining "employer" under Title VII. Brief for United States and EEOC as *Amici Curiae* in *Meritor* (No. 84-1979) at 22. As to the inclusion of the term "agent" in Title VII's definition of employer, the EEOC noted that under agency principles, "a person who is another's agent for some purposes does not therefore act as the other's agent for all purposes." *Id.*

[11] There is no support for petitioner's or the government's secondary argument that their tests do not create strict liability because employers may be able to prevail depending on their sexual harassment policies and complaint procedures. When the Court refused to impose strict liability on the bank in *Meritor*, it did so despite the fact that the bank did not have a policy that specifically addressed sexual harassment and that its grievance procedure was obviously deficient. 477 U.S. at 72-73. Thus, petitioner's test, which imposes strict liability and then offers a potential safe harbor, offers nothing that has not already been rejected by the Court in *Meritor*. It should be rejected again here.

The common law of agency recognizes that, in certain situations, a blameless employer may be held indirectly, or vicariously, liable for the intentional torts of its employees. The two well-recognized situations in which such vicarious liability may be imposed are when an agent commits a tortious act "within the scope of his employment," and when an agent commits a tort while acting with "apparent authority." [12] An act done "within the scope of employment" is one that was done with the intent of furthering the employer's business, even if the act itself was unauthorized or even prohibited by the employer. An act done with "apparent authority" occurs when the principal's conduct causes a third party reasonably to believe that the agent is acting within the scope of his employment and carrying out his normal duties—at least from the public's perspective—when in fact he is not. Neither of these species of vicarious liability supports petitioner's effort to impose liability on the City in this case.

A. The Conduct Allegedly Creating The Hostile-Environment Sexual Harassment Was Outside The Scope Of Terry's And Silverman's Employment.

When Terry and Silverman engaged in the inappropriate conduct at issue here, they were pursuing their own agendas and clearly acting outside the scope of their employment. Under well-established agency principles, their employer, the City, cannot be held vicariously liable for such conduct.

To determine whether agency law imposes liability in a particular setting, courts look to agency principles that have been developed for related kinds of conduct. *See, e.g., American Soc'y of Mechanical Eng'rs, Inc. v. Hydro-*

[12] The term *respondeat superior* ("let the master answer") frequently is used to describe the vicarious liability of an employer for torts of its employees committed "within the scope of employment." *See, e.g., Konradi v. United States*, 919 F.2d 1207, 1210 (7th Cir. 1990). Other sources define the term more broadly, using it generally to describe any kind of vicarious liability of an employer for the torts of its employees. *See, e.g.*, W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 69, at 499 (5th ed. 1984).

level Corp., 456 U.S. 556, 568 (1982). Thus, a proper application of agency principles to Title VII hostile-environment sexual harassment should look to the common-law treatment of intentional or "wanton" torts, particularly those that involve unwelcome touching or verbal abuse of a sexual nature.

Under common-law agency principles, an employer is held vicariously liable for an intentional, wanton tort of its employee only if the tort was committed "within the scope of employment." The traditional "scope of employment" test looks not to whether the act is done during work time, but to whether the conduct is an extension of, or incident to, the employee's regular work and whether it was done to further the employer's interest.[13] *See, e.g., Stafford v. Postal Tel. & Cable Co.*, 198 S.E. 117, 120 (Ga. App. 1938); *see also* W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 70, at 502 (5th ed. 1984) (scope of employment "refers to those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment"); Restatement (Second) of Agency § 235 ("An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.").[14] If an employee adopts

[13] Although the majority of pre-Title VII decisions analyzing the propriety of vicarious liability for intentional, wanton torts applied the "scope of employment" test described in the text, a notable minority simply ruled that such torts fall outside the scope of employment as a matter of law. *See Hyde v. Baggett Trans. Co.*, 236 F. Supp. 194, 195 (E.D. Tenn. 1964); *Digsby v. Carroll Baking Co.*, 47 S.E.2d 203, 205 (Ga. App. 1948), and cases cited therein.

[14] *See also* Warren A. Seavey & Livingston Hall, *Cases on the Law of Agency* 39 (1956) (stating that there is no reason to hold an innocent master liable for the tort of its servant if "[t]he employment furnished no motivation for the act"); *Alford v. Noonan*, 259 F.2d 113, 115 (2d Cir. 1958) (to hold the master liable,

methods that are not authorized—or that are even forbidden—by the employer, but is nevertheless carrying out duties specifically delegated by the employer, the conduct may be held to be within the scope of employment. *See, e.g., White Auto Stores, Inc. v. Reyes*, 223 F.2d 298, 302-03 (10th Cir. 1955); *Adams Express Co. v. Lansburgh & Bros.*, 262 F. 232, 233-34 (D.C. Cir. 1920). Conversely, conduct is outside the scope of employment when it bears no relationship to work that the offending employee was hired to perform.[15]

Decisions involving common-law claims for sexually-harassing conduct comparable to what is now denominated hostile-environment sexual harassment held such conduct to be outside the scope of employment and, thus, declined to impose vicarious liability on the employer. *See, e.g., Western Union Tel. Co. v. Hill*, 67 F.2d 487 (5th Cir. 1933) (shop manager acted outside the scope of his employment, and employer could not be held liable, when the manager expressed to a customer his desire to "love and pet" her); *Houston v. Oppenheim*, 145 So. 339, 340 (Miss. 1933) (store owners not liable when their general manager made an improper proposal to an employee saleswoman because the manager "had turned aside from his master's business" to "engage in a frolic of his own").[16]

"it must appear that the act complained of was done to carry out the directions of the master, express or implied, and not to effect some purpose of the servant alone") (citation omitted) (applying Vermont law).

[15] A comparable standard was applied by this Court for assessing vicarious liability for willful torts under the Federal Employers' Liability Act. *See Davis v. Green*, 260 U.S. 349, 351 (1922) (holding railroad company not liable for a wanton killing by an engineer, absent proof that the killing was "done to further the master's business" and was more than just "a wanton and wilful act done to satisfy the temper or spite of the engineer").

[16] *See also Chaney v. Frigidaire Corp.*, 31 F.2d 977 (5th Cir. 1929) (employer not vicariously liable for actions of salesman who assaulted and forcibly held a customer in his car); *Fleming v. Bronfin*, 80 A.2d 915 (D.C. 1951) (affirming directed verdict for the employer on plaintiff's vicarious liability claims premised on

Pre-Title VII common-law agency decisions occasionally found certain specific examples of harassing conduct of a sexual nature to be within the scope of employment, thus leading to vicarious liability for the employer. In such cases, however, liability was premised on the fact that the improper sexual conduct was linked to the employee's business duties. *See, e.g., Digsby*, 47 S.E.2d at 203, 208 (employer held vicariously liable for acts of employee bill-collector who, in an effort to collect a debt, threatened a woman that he would "take it [the overdue bill] out in trade"); *Singer Sewing Mach. Co. v. Stockton*, 157 So. 366, 367 (Miss. 1934) (employer vicariously liable for acts of its salesman who made suggestive sexual remarks to a female customer because "his attempt to cultivate relations and make engagements with her seem[ed] to have been largely for the purpose of effecting a sale"). The principle of agency law that developed in these and other cases does not fit hostile-environment sexual harassment, in which a supervisor's conduct is almost invariably unrelated to his assigned duties.[17] At most, these cases suggest a possible basis for vicarious liability in cases of *quid pro quo* sexual harassment, in which a supervisor's harassment is directly linked with the supervisor's performance of his assigned duties, in the sense that the supervisor "conditions a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of

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employee's indecent touching of a customer); *Hoppe v. Deese*, 61 S.E.2d 903 (N.C. 1950) (telephone company employee acted outside the scope of his employment when he assaulted a female customer by lifting her onto a bed, and plaintiff had no cause of action under a *respondeat superior* theory against the employer for the lascivious conduct of its employee); *Rohrmoser v. Household Fin. Corp.*, 86 S.W.2d 103 (Mo. App. 1935) (verdict properly directed for employer when employee grabbed plaintiff and tore her dress).

[17] There could be some hypothetical fact situation that could bring a hostile-environment claim within the scope of employment. *See, e.g., Stafford v. Missouri*, 835 F. Supp. 1136, 1150-51 (W.D. Mo. 1993) (employer liable for supervisor's harassment of employee because harassment was motivated by a desire to serve employer).

sexual conduct." *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994).[18]

This case exemplifies hostile-environment conduct that is outside the scope of the harassers' employment. The instances of unwelcome touching and inappropriate language had nothing to do with Terry's and Silverman's jobs. They were pursuing their personal agendas when they engaged in the inappropriate conduct. There is simply no testimony that any of the conduct was done in furtherance of the job, nor is there any evidence that the kind of conduct at issue somehow could have been viewed as helpful to the City or as one way of promoting the City's interests.[19]

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[18] Because this is not a *quid pro quo* case, we do not attempt to describe the proper metes and bounds of employer liability in such circumstances. *See, e.g., Jansen v. Packaging Corp.*, 123 F.3d 490 (7th Cir. 1997) (en banc), *cert. granted sub nom. Burlington Indus., Inc. v. Ellerth*, No. 97-569 (Jan. 23, 1998); *see also, e.g.*, Stacey Dansky, Note, *Eliminating Strict Employer Liability in Quid Pro Quo Sexual Harassment Cases*, 76 Tex. L. Rev. 435 (1997) (arguing that a negligence standard should apply in *quid pro quo* cases).

[19] Most post-*Meritor* Title VII decisions recognize that hostile-environment sexual harassment is generally outside the scope of employment. *See, e.g., Torres v. Pisano*, 116 F.3d 625, 634 n.10 (2d Cir.) (recognizing that liability rarely will attach under scope of employment test), *cert. denied*, 118 S. Ct. 563 (1997); *Andrade v. Mayfair Management, Inc.*, 88 F.3d 258, 261 (4th Cir. 1996) ("illegal sexual harassment is an illegitimate corporate activity, beyond the scope of supervisors' employment"); *Gary v. Long*, 59 F.3d 1391, 1397-98 (D.C. Cir.) (assuming that hostile-environment harassment is outside the scope of employment), *cert. denied*, 116 S. Ct. 569 (1995); *Bouton v. BMW of North America, Inc.*, 29 F.3d 103, 107 (3d Cir. 1994) (absent use of actual authority, hostile-environment harassment is outside the scope of employment); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1417-18 (10th Cir. 1987) ("[s]exual harassment simply is not within the job description of any supervisor or any other worker in any reputable business"); *but see Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 182-84 (6th Cir.) (harassment may be within the scope of employment), *cert. denied*, 506 U.S. 1041 (1992).

Petitioner appears to have conceded that the City cannot be held vicariously liable on the theory that Terry and Silverman acted within the scope of their employment. Although petitioner states in passing in a footnote that "[l]iability can also be found . . . in cases in which a supervisor effectuates the offending behavior 'within the scope of employment,'" Pet. Br. 21 n.17, she does not argue that the sexual harassment at issue here was within the scope of employment, nor does she contest the court of appeals' holding that these activities were outside the scope of employment. Pet. App. 10a-12a.

B. The Common-Law Concept Of Apparent Authority Does Not Apply To Hostile-Environment Sexual Harassment Cases.

The common-law agency concept of "apparent authority" has no application to sexual harassment cases based on hostile work environment. That conclusion follows from the very nature of apparent authority as a basis for vicarious liability.

The crux of apparent authority, as its name implies, is that the agent *appears* to be authorized to take certain actions that in fact he is not authorized to take. Apparent authority is a specialized branch of vicarious liability developed to deal with tortious conduct that does not appear tortious on its face. The tortious nature of the conduct is disguised because the agent appears to be carrying out his duties and acting within the scope of his employment, and the victim of the conduct has no reason to question the legitimacy or propriety of the agent's action.[20]

Apparent authority cases typically involve misrepresentation or deceit by an agent who takes advantage of

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[20] Comments to the Restatement's apparent authority sections cite some of the classic examples of tortious conduct that otherwise appears normal on its face: where a telegraph operator sends false messages purporting to come from a third person, § 219, comment e; where a designated company spokesman makes incorrect statements, § 247, comment c; and where a warehouse employee issues false receipts to customers, § 261, comment b.

his position to commit the tort. *See* Warren A. Seavey, *Handbook of the Law of Agency* 162 (1964). In such cases, at least from the third-party victim's perspective, the agent is engaged in a normal business activity. As this Court has explained:

> Under an apparent authority theory, liability is based upon the fact that the agent's position facilitates the consummation of fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.

American Soc'y of Mechanical Eng'rs, 456 U.S. at 566 (*quoting* Restatement (Second) of Agency § 261, comment a, at 571) (internal quotations omitted).

A principal can be held vicariously liable in an apparent authority case if (but only if) the principal has contributed to the appearance of authority by taking some action to convey to third parties that the agent is acting on behalf of the principal. In other words, for liability to attach, a principal must have done something to give the victim a reasonable belief that the agent had authority to engage in the particular conduct at issue. *See, e.g., Simpson v. Compagnie Nationale Air France*, 248 N.E.2d 117, 120 (Ill. 1969) ("The theory of apparent authority rests on two premises: a manifestation by the principal to a third party, and belief by that third party that the extent of the authority granted to the agent encompasses the contemplated activity."); *see also* Restatement (Second) of Agency § 27.

Given the nature of apparent authority and the circumstances in which the concept has been applied at common law, it is plain that the concept cannot be used as a basis for vicarious liability of the employer in a hostile-environment sexual harassment case like this one. No reasonable employee in such a case could believe that her harasser has been authorized to engage in the offending conduct. The employer has not communicated the existence of any such authorization,[21] and there is no other basis on which the victim could conclude that the wrongdoing appears to have been authorized.

It is improper, therefore, to extend the "apparent authority" rationale into the realm of intentional torts like sexual harassment. Such wrongs diverge obviously from expected or desired standards of conduct, and the victim has reason to know that the conduct is not "regular on its face."[22] That is why pre-Title VII cases dealing with intentional, wanton torts of a sexually harassing nature describe the test for vicarious liability *solely* in terms of whether the conduct was within the scope of employment and not whether there was apparent authority. The com-

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[21] An employer could be deemed vicariously liable only if and when it did something to give the victim a reasonable belief that the supervisor actually had authority from the employer to sexually harass its employees. *See, e.g., Barnes v. Costle*, 561 F.2d 983, 996 (D.C. Cir. 1977) (apparent authority principles inapplicable because employee could not reasonably believe that authority for the supervisor's harassment derived from the employer); *see also Jansen*, 123 F.3d at 548 (Coffey, J., concurring and dissenting) ("[I]n the sexual harassment context, the principal's actions must have given the victim a reasonable belief that the perpetrator of the harassment had authority to harass. For this reason, apparent authority seems an unlikely basis for employer sexual harassment liability.") (*quoting* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 Vand. L. Rev. 1229, 1247-48 (1991)).

[22] *See, e.g., In re Atlantic Fin. Management, Inc.*, 784 F.2d 29, 32 (1st Cir. 1986) (noting that the apparent authority doctrine applies in "misrepresentation" cases), *cert. denied*, 481 U.S. 1072 (1987); *Fields v. Horizon House, Inc.*, No. 86-4343, 1987 U.S. Dist. LEXIS 11315, at *14 (E.D. Pa. Dec. 9, 1987) (apparent authority is unlikely when the agent's conduct is unusual); *Bozarth v. Harper Creek Bd. of Educ.*, 288 N.W.2d 424, 425-26 (Mich. App. 1979) (apparent authority liability is "limited to situations where, from the viewpoint of the person being harmed, the agent appears to have been acting within the scope of his employment"); W.W. Allen, Annotation, *Doctrine of Apparent Authority as Applicable Where Relationship Is That of Master and Servant*, 2 A.L.R.2d 406, 409 (1948) ("[i]n the ordinary tort case it is unquestionably absurd to think of applying a doctrine of apparent authority").

mon-law agency principle of "apparent authority" was not meant to apply to evident intentional torts that are unrelated to the agent's responsibilities,[23] and it should not now be utilized for a purpose that was never intended.

In this case, the district court expressly found that "during the time of Faragher's tenure with the City, from 1985 to 1990, a reasonable person would have known that sexual harassment violates clearly established law." Pet. App. 98a. As a result, any liability theory premised on "apparent authority" to sexually harass is deficient from the outset.

Nonetheless, petitioner relies heavily on Section 219 (2)(d) of the Restatement, closely parsing the Reporter's language in an effort to support liability against the City. Petitioner disregards the fact that this Restatement provision was intended to describe and summarize the apparent authority case law. The Restatement does not exist in a vacuum, and its provisions do not have an independent life of their own, divorced from the common-law authorities from which they are derived.

Section 219(2)(d) provides that an employer may be liable for the tort of its servant if "the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency

[23] In *American Society of Mechanical Engineers*, the Court took note of the dissent's argument that principals generally were not held liable for intentional torts of their agents under agency law of the late 19th century. 456 U.S. at 568 n.6. In holding that liability nevertheless could be premised on a theory of apparent authority in that case, the Court looked to cases involving "analogous" torts. *Id.* (listing fraud cases). In particular, the Court quoted one Minnesota decision that "summarized the reasoning" of 19th century apparent authority cases: "Persons receiving dispatches in the usual course of business, *where there is nothing to excite suspicion*, are entitled to rely upon the presumption that the agents . . . have faithfully and honestly discharged the duty owed . . . ." *Id.* (*quoting McCord v. Western Union Tel. Co.*, 39 N.W. 315 (Minn. 1888)) (emphasis added).

relation." Petitioner's reliance on this text ignores the common-law principles that underlie it and give it meaning. It invites error to pluck a sentence fragment from the Restatement and apply it as if it were a statute, separate and apart from the legal background that the statement is intended to synthesize.[24] An analysis of the origins —and recognized limitations—of the "apparent authority" doctrine demonstrates its inapplicability to conduct such as sexual harassment.

[24] Petitioner engages in just this kind of cherry-picking. She cites only the second clause of Section 219(2)(d), which states that an employer is subject to liability for a servant's tort when the servant "was aided in accomplishing the tort by the existence of the agency relation," and argues that this clause results in a rule that an employer is responsible for hostile-environment sexual harassment whenever a supervisor is "aided in" perpetrating harassment by his supervisory authority. Pet. Br. 21. In fact, the second clause of Section 219(2)(d) leads to employer liability in only "narrow factual circumstances." *Smith v. Metropolitan Sch. Dist. Perry Township*, 128 F.3d 1014, 1029 (7th Cir. 1997). The second clause is simply a refinement of the "apparent authority" doctrine articulated in the first clause of Section 219(2)(d), which, as addressed more fully in the text above, is a theory of liability primarily applicable to tortious acts that appear normal on their face—generally torts of misrepresentation. As the Seventh Circuit recently observed:

> The [Restatement] commentary illustrates liability under the second clause of § 219(2)(d) with two narrow examples: a telegraph operator sending false telegraph messages, or a store manager cheating customers at the store. As the D.C. Circuit recognized, in such cases, liability is based upon the fact that the agent's position facilitates the consummation of the tort, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.

Smith, 128 F.3d at 1029 (*quoting Gary*, 59 F.3d at 1397) (internal quotations omitted); *see also* Phillips, *Employer Sexual Harassment Liability*, 44 Vand. L. Rev. at 1249-50. The second clause of Section 219(2)(d) does not support the expansive interpretation that petitioner gives it. Rather, it should be read as a narrow "apparent authority"-based exception to the normal rule that employers are not vicariously liable for torts outside the scope of employment.

C. Even Under An "Apparent Authority" Test Based On The Use Of Supervisory Authority, The City Is Not Liable For The Conduct Of Its Supervisors In This Case.

Even though the concept of "apparent authority" properly does not apply to hostile-environment sexual harassment, some courts of appeals have determined whether or not an employer is liable in such cases by applying one or another version of a test based on the Restatement's apparent authority section, Section 219(2)(d).[25] *See, e.g., Torres*, 116 F.3d at 635; *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997), *pet. for cert. filed*, No. 97-232 (Aug. 6, 1997).

Even under the approach adopted by these courts, however, the City would not be liable in this case. That is

[25] At least six circuits recognize that liability in a hostile-environment sexual harassment case should attach to the employer only based on the employer's negligence and not on any "apparent authority" theory. *See, e.g., Jansen*, 123 F.3d at 495 (7th Cir.) (en banc) (per curiam) ("the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability"); *Davis v. City of Sioux City*, 115 F.3d 1365, 1368 (8th Cir. 1997) ("[i]n our circuit, we have applied the knew or should have known standard to supervisor-induced hostile environment sexual harassment claims"); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 807 (5th Cir. 1996) (stating that an employer is only liable for hostile-environment harassment by a supervisor "if it knew or should have known of the employee's offensive conduct and failed to take steps to repudiate that conduct"); *Andrade*, 88 F.3d at 261 (4th Cir.) ("an employer is liable for a sexually hostile work environment created by a supervisor or other employee only if the employer knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action"); *Nichols*, 42 F.3d at 508 (9th Cir.) ("The proper analysis for employer liability in hostile environment cases is what management-level employees knew or should have known."); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988) (applying *Meritor* in Title IX context, "educational institution is liable upon a finding of hostile environment sexual harassment perpetrated by its supervisors upon employees if an official representing that institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, unless that official can show that he or she took appropriate steps to halt it").

because the cases relying on Section 219(2)(d) require proof that the harassment was carried out through some active abuse of the agent's supervisory authority. The harasser is said to be "aided" under Section 219(2)(d) only when he affirmatively capitalizes on his supervisory status.[26] Evidence of such active use of supervisory authority is altogether lacking here. Instead, petitioner attempts to rely on the mere *existence* of supervisory authority and the resulting proximity of harasser and victim as a basis for arguing that the harasser was "aided" by the agency relation. This far broader test, the effective equivalent of strict liability, is not supported by the cases that have employed an "apparent authority" test based on Section 219(2)(d). *See, e.g., Harrison*, 112 F.3d at 1446 ("liability [does not] attach where the harasser's agency relationship merely provided him with proximity to plaintiff").

As the en banc court below recognized, "[i]n one sense, a supervisor is always aided in accomplishing hostile environment sexual harassment by the existence of an agency relationship with his employer because his responsibilities include close proximity to and regular contact with the victim." Pet. App. 12a (*citing Gary*, 59 F.3d at 1397).[27] As the court of appeals also observed, however, "[t]he common law rule does not use 'aided' in such a broad sense." Pet. App. 13a; *see also* Phillips, *Employer Sexual Harassment Liability*, 44 Vand. L. Rev. at 1249.

[26] *See, e.g., Torres*, 116 F.3d at 635 ("to establish liability on the theory that the supervisor exploited the agency relationship in committing the harassment, a plaintiff 'must allege facts which establish a nexus between the supervisory authority' and the harassment") (*quoting Tomka v. Seiler Corp.*, 66 F.3d 1295, 1306 (2d Cir. 1995)); *Karibian v. Columbia Univ.*, 14 F.3d 773, 780-81 (2d Cir.) (harasser must "use his actual or apparent authority to further the harassment alleged"), *cert. denied*, 512 U.S. 1213 (1994).

[27] *See also Karibian*, 14 F.3d at 780 ("where a low-level supervisor does not rely on his supervisory authority to carry out the harassment, the situation will generally be indistinguishable from cases in which the harassment is perpetuated by the plaintiff's co-workers").

Petitioner's formulation, which stresses the victim's fear of retaliation based on the supervisory status of the harasser, fails for the same reason that courts have rejected "mere proximity" as a basis for vicarious liability in hostile-environment sexual harassment cases. As the Second Circuit explained in *Torres* when it refused to find employer liability based on "mere proximity" or "fear of retaliation,"

> It is likewise the case that the supervisor is always aided by the employment relationship because the employee will fear the repercussions that might result from her complaining or resisting. But this exception too, if applied in the absence of specific evidence that the supervisor used his authority to place the employee in a position in which she felt that she could not complain without facing adverse consequences, would swallow the rule . . . .

116 F.3d at 635.

To the extent that Section 219(2)(d) has any proper application at all in hostile-environment sexual harassment cases, the court of appeals correctly limited it to situations in which "the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status." Pet. App. 13a. In this case, petitioner seeks to impose liability on the City solely on the ground that Terry and Silverman were supervisors. This is inadequate. The facts establish, as the court of appeals held, that "neither Terry nor Silverman was aided in accomplishing the harassment by the existence of his agency relationship with the City." Pet. App. 12a. They could have engaged in the same conduct as co-workers:

> No person threatened to fire or demote Faragher for refusing to accommodate Terry's and Silverman's harassing overtures. Moreover, the harassment cannot reasonably be viewed as conduct associated with Terry's and Silverman's status as agents of the City. . . . And, there is no evidence that either Terry or Silverman made any employment decisions based upon Faragher's response to their sexual overtures.

Id. at 13a (citation omitted). Under the formulation of the "apparent authority" test adopted in such decisions as *Torres* and *Harrison*, the evidence in this case is insufficient to impose vicarious liability on the City.[28]

II. UNDER COMMON-LAW AGENCY PRINCIPLES, AN EMPLOYER THAT IS NEGLIGENT OR RECKLESS MAY BE HELD DIRECTLY LIABLE FOR HOSTILE-ENVIRONMENT SEXUAL HARASSMENT.

Although agency principles ordinarily do not render an employer vicariously liable for hostile-environment sexual harassment committed by its supervisors, an employer

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[28] Petitioner's references to Terry having obtained an unsigned resignation letter or having the power "to banish complainants to undesirable towers or unwanted shifts," Pet. Br. 29, have nothing to do with the alleged sexual harassment. There was no evidence suggesting that Terry or Silverman used such hypothetical powers in connection with their sexually-harassing conduct. Likewise, there was no evidence at trial, and the district court did not find, that "Terry's ability to visit revenge upon any who crossed him was legendary." Pet. Br. 30. There was also no evidence, and the district court did not find, that "sexual harassment was the rule, not the exception" or that "[t]he atmosphere was one of unbridled licentiousness and petty, workaday tyranny." *Id.* Indeed, the evidence, as recognized by the trial court, demonstrated that sexual harassment was the *exception* and not the rule. *See, e.g.*, J.A. 193 (Faragher: "[f]or the most part, I enjo[y]ed my job on the beach"); J.A. 133, 135 (Harrington enjoyed her five years working for the City at the beach and, from what she could see, Faragher and Ewanchew enjoyed their work); J.A. 260 (Evans: atmosphere in locker room was "friendly" and joking was not offensive). Indeed, the evidence demonstrates that, apart from the rather infrequent incidents described above, *see* pages 5-7, *supra*, petitioner spent most of her five years actually on the beach, performing her job as a lifeguard, and free from any unwelcome conduct (or indeed any conduct at all) by Terry or Silverman. *See, e.g.*, J.A. 123-24 (Ewanchew testifying that bulk of work day was spent on the beach without contact with Terry); Trial Testimony, June 22, 1994, 225 (Faragher stating that she generally found the beach a good place to work). Petitioner's unacceptable poetic license with the facts is no substitute for the nonexistent record evidence that Terry or Silverman ever used his supervisory authority to facilitate his inappropriate conduct.

properly may be held directly liable for its own negligence in relation to such conduct. This principle fairly imposes liability when the employer is culpable. It also properly reflects and implements the public policy underlying Title VII.

In pre-Title VII common-law agency decisions dealing with intentional, wanton torts, courts generally recognized that an employer could be held liable on theories of negligent hiring or negligent retention of the tortfeasor, notwithstanding the inapplicability of vicarious liability.[20] *See, e.g., Fleming v. Bronfin*, 80 A.2d 915, 917 (D.C. 1951) (affirming trial court's dismissal of claim resting on assertion that assault was within the scope of employment, but reversing directed verdict on negligent hiring and retention claims). Under a negligence standard, an employer would be liable when it had actual or constructive knowledge of wrongdoing but failed to take appropriate remedial action.

Even apart from the common-law precedents, the kind of harassment at issue also supports a negligence standard as the appropriate test for employer liability in Title VII hostile-environment cases. Hostile-environment sexual harassment can arise from conduct that the harasser perceives to be merely flirtatious (as opposed to disparaging or persecuting). Reactions to certain conduct of a sexual nature can differ significantly depending on the perspective of the actor or the recipient. As the EEOC observed in its brief to the Court in *Meritor*, "sexual advances and innuendo are ambiguous: depending on their context, they may be intended by the initiator, and perceived by the recipient, as denigrating or complimentary, as threatening or welcome, as malevolent or innocuous." Brief for United States and EEOC as *Amici Curiae* in *Meritor* (No. 84-1979) at 13. Indeed, courts have even strug-

[20] A few courts held that employers could not be held liable even on negligence grounds for willful torts deemed to be outside the scope of employment. *See, e.g., Burgert v. Union Pac. R.R. Co.*, 240 F.2d 207 (8th Cir. 1957) (applying Kansas law); *Gens v. Wagner Elec. Mfg. Co.*, 31 S.W.2d 785 (Mo. 1930).

gled in defining the phrase "hostile work environment" for the purpose of identifying actionable sexual harassment, and societal views differ as to what constitutes abusiveness. *See Jansen*, 123 F.3d at 501 (Flaum, J., concurring).

The employer's capacity to prevent or eradicate hostile-environment sexual harassment is limited by the vagueness of its contours.[30] The definitional complexities associated with hostile-environment harassment make it difficult for employers to communicate to their employees a consistent, unambiguous message about what conduct is prohibited. *Jansen*, 123 F.3d at 501 (Flaum, J., concurring). In such circumstances, a negligence standard—which "possesses the flexibility to respond by degree to amorphous or variable harms"—is appropriate. *Id.* at 502.

This case illustrates the need for a flexible negligence standard. The environment in which the misconduct occurred was not a conservative milieu—it was not a bank or a library. Instead, it was a beach staffed by young lifeguards who created a "boisterous" and "rambunctious[]" atmosphere in which it was not uncommon for both men and women to engage in conversations that had sexual undertones. Pet. App. 72a; J.A. 122; 152-54; 193-96; 235-36; 244-45; 259-60. When they were together, the lifeguards were in a one-room, cramped headquarters in which men and women shared locker and shower facilities.[31] As the court of appeals concluded in rejecting

[30] One particularly striking definitional dilemma in delineating improper workplace sexual advances is the fact that "it is the abuse of the practice, rather than the practice itself," that gives rise to a Title VII claim. *Barnes*, 561 F.2d at 1001 (MacKinnon, J., concurring). Sexual advances are not "intrinsically offensive," in the way that other forms of discrimination prohibited by Title VII are. *Id.*; *see also* Brief for United States and EEOC as *Amici Curiae* in *Meritor* (No. 84-1979) at 13 ("racial slurs are intrinsically offensive and presumptively unwelcome").

[31] The lifeguards were stationed in a remote location making it more difficult for the City to become aware of any potential problems. *See, e.g., Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d

common-law claims of negligence against the City, there was no basis to conclude that the City should have known that on a number of occasions spread over the course of several years the conduct of two supervisory employees crossed the line or was deemed unwanted by some number of lifeguards.[22] A flexible negligence standard that takes into account the context, conduct, frequency, and environment is the most appropriate way to determine an employer's notice and liability for the acts of its supervisors.

A negligence standard also comports with the remedial goals of Title VII. Title VII's goal of guaranteeing equal employment opportunities for both men and women "dictates that deterrence be the foremost objective." *Jansen*, 123 F.3d at 495 (Flaum, J., concurring). Under a negligence standard, employers have a strong incentive to take prompt remedial action whenever notified of harassment, and the constructive notice prong of the negligence test encourages employers to take reasonable steps to prevent harassment. By contrast, under a strict liability regime, a victim of harassment may be tempted to defer notice to the employer until she is certain a hostile environment

59, 64 (2d Cir. 1992) (Rochester-based employer not liable for the harassing acts of the supervisor in charge of store at remote Oswego location); *Torres*, 116 F.3d at 634 n.12 (harassment perpetrated by the highest-ranking official at a "remote" Dental Center owned by New York University would not automatically cause NYU to be held liable).

[22] Indeed, Ewanchew testified that the lifeguards, both men and women, used sexual terms in a joking or light way that she did not find offensive. J.A. 121-22. She participated with Gordon in conversations involving sexual joking, and she did not object to them. J.A. 122-23; *see also* Trial Testimony, June 22, 1994, 95-96, 98. It is difficult to say whether or when such conversations created a hostile environment. *See* J.A. 152-53 (Gordon: "we all used inappropriate language from time to time," as well as teasing language with sexual overtones; it was hard to know when the line was crossed). Gordon also testified that the lifeguards engaged in "familial touches, putting arms around shoulders, pats on the back" and "an occasional pat on the fanny" that were not offensive. J.A. 153-54.

has been established and her claim perfected. The goals of Title VII are not advanced by tests that may inhibit communication or by a rule that may cause employers to regard remedial action as a concession of liability.

The frequently subjective character of hostile-environment harassment leads to "the infeasibility of an employer's stamping out this sort of harassment without going to extreme expense and greatly curtailing the privacy of its employees, as by putting them under continuous video surveillance." *Jansen*, 123 F.3d at 511 (Posner, C.J., concurring and dissenting). Strict liability that is imposed when no reasonable measures could have prevented the harassment will have no deterrent effect and will only serve to impose extra costs on employers—much of which ultimately will be shifted to the public. *Id.* Moreover, the typical cost-shifting rationale used to justify strict liability in other settings (*e.g.*, in products liability, where manufacturers are presumed responsible for harm caused by defective products) "does *not* justify making employers 'strictly liable' for the seemingly intractable *social* problem of sexual harassment." *Jansen*, 123 F.3d at 522 (Coffey, J., concurring and dissenting) (emphasis in original).

Finally, any test other than negligence also raises potential privacy and freedom of speech problems. As an alternative to strict liability, petitioner proposes that an employer be permitted to escape such liability by proving the efficacy of its anti-harassment program. Pet. Br. 22. In this scenario, employers would have an incentive to trumpet the corrective actions they took with regard to any sexually-suggestive speech or conduct in the workplace—regardless of any privacy concerns on the part of the people involved or whether the speech or conduct actually created a hostile environment. Anything less would imperil the employer's proof that its policy is rigorous and accessible. Moreover, employers would have an incentive to restrict *any* complained-of, sexually-suggestive speech, whether or not it created a hostile environment under the law—a result that raises serious First Amendment implications for public employers such as the City. *See, e.g.*,

Eugene Volokh, *Freedom of Speech and Appellate Review in Workplace Harassment Cases*, 90 Nw. U. L. Rev. 1009 (1996) (citing Jennifer Goode, *It's Art vs. Sexual Harassment*, The Tennessean (Nashville), Mar. 1, 1996, at 1A (reporting a city attorney's explanation for the removal of a painting from city hall, after a complaint of sexual harassment: "I feel more comfortable siding with protecting the rights under the Title VII sexual harassment statutes than I do under the First Amendment.")).

Finally, the constructive knowledge prong of the negligence standard allows necessary flexibility to take into account the time frame or social climate within which the prohibited conduct occurred. In the case of sexual harassment, it is clear that there now exists in this country a mature public policy against workplace sexual harassment. But that is relatively recent:

> The public policy against sexual harassment in the workplace is a relatively recent development. The term "sexual harassment" was unknown before the mid-1970s, and during that decade many courts did not recognize it as an actionable form of sex discrimination. An important turning point was the issuance of new [sexual harassment] regulations by the EEOC in 1981 . . . . However, even in the mid-1980s, many courts continued to accept sexual harassment of women employees as an unobjectionable and unavoidable aspect of the workplace. The existence of a "well-defined and dominant" public policy against workplace sexual harassment was still in dispute.

Jeffrey Sarles, *The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 Harv. Women's L.J. 17, 28-29 (1994) (citations omitted); *see also Reed v. A.W. Lawrence & Co.*, 95 F.3d 1170, 1179 (2d Cir. 1996) (noting that "[i]t cannot be denied that we live in a time of significant cultural change, in which varieties of coarse conduct once taken for granted in the American workplace appear to be subject to punishment under the law" and taking judicial notice that in mid-1991 "the popular press devoted a vast amount of

attention to the issue of sexual harassment"). The growth in public awareness of sexual harassment as an unlawful act is reflected in the very recent explosion of sexual harassment claims.[33] Given these considerations, the conduct that would come to a reasonable employer's notice in 1998 is likely to be considerably more encompassing than the conduct that would have come to a reasonable employer's notice in 1985 or 1990.

III. NONE OF PETITIONER'S PER SE RULES PROPERLY IMPUTES KNOWLEDGE OF TERRY'S AND SILVERMAN'S CONDUCT TO THE CITY.

Without automatic liability, petitioner is forced to rely on several ad hoc attempts to saddle the City with actual or constructive knowledge of Terry's and Silverman's conduct.[34] In particular, petitioner argues for a per se rule that actual notice to any employee in any supervisory role constitutes actual notice to the employer, regardless of what level of authority the supervisor may occupy and in what capacity and under what conditions he may have learned of the alleged harassment. Second, petitioner asserts that the court of appeals erred in holding as a matter of law that, on this record, the "pervasiveness" that created a hostile work environment for Faragher did not give the City constructive knowledge of the harassment. Finally, petitioner urges a rule that an employer's failure

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[33] One estimate indicates, for example, that sexual harassment charges increased 69%—from 3,329 to 5,629—between 1991 and 1992. *More Disability Charges Have Been Filed Than EEOC Estimated*, Daily Lab. Rep. (BNA) No. 15, at A-4 (Jan. 26, 1993). By comparison, according to one of petitioner's *amici*, the EEOC received 15,889 sexual harassment complaints in fiscal year 1997. Brief *Amicus Curiae* of National Women's Law Center at 21-22.

[34] Petitioner concedes that the City cannot be charged with actual knowledge of the harassment by attributing to the City the knowledge of Terry and Silverman, the harassers. Pet. Br. 32 n.39. Given this concession and the character of the supervisory positions occupied by Terry and Silverman, there is no need to address whether there are occasions when actions of supervisor-harassers can be imputed directly to employers.

to disseminate effectively a sexual harassment policy between 1985 and 1990 saddles the employer with constructive knowledge of whatever harassment may have occurred, regardless of the facts or circumstances involved. None of these makeshift rules is consistent with common-law agency principles, Title VII, or sound policy.

A. Gordon's Knowledge Cannot Be Imputed To The City.

The court of appeals correctly held that Faragher's complaints to Gordon did not provide a basis for holding the City directly liable, because Gordon did not occupy a higher management position and, in any event, he received the complaints not in his capacity as an agent of the City but as a friend of Faragher and other lifeguards.[35] Pet. App. 15a & n.9. Under a negligence standard, knowledge gained by an employee should be imputed to an employer only when it "has a reasonable chance of being able to respond to the information." *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997). Given the variations in the hierarchical systems of different organizations—as well as the myriad possible variations between the levels of harasser, victim, and confidant—a flexible standard that looks to the employer's "reasonable chance" of learning about the harassment is appropriate. In this case, the City did not have a reasonable chance to learn of the harassment through conversations with Gordon, and the court of appeals correctly ruled that notice should not be imputed to the City in these circumstances.[36]

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[35] It is not clear from the record when Faragher complained to Gordon. It is possible that such complaints were made only after Ewanchew sent her letter to Bender. *See, e.g.*, Trial Testimony, June 22, 1994, 5-6 (Gordon does not know what year Faragher complained); *id.* at 213-14 (Faragher remembers complaining of incident in 1990). If that is the case, then as a factual matter Gordon did not have notice at a time that would have made any difference in the investigation of this matter.

[36] The district court found that Gordon's knowledge should not be imputed to the City because Gordon did not rank as higher management. Pet. App. 84a. It nonetheless held that Gordon's knowledge was one basis for imposing liability on the City, based solely on the conclusion that Gordon was an "agent" of the City. Pet. App. 92a-93a. In so concluding, the district court incorrectly fused vicarious liability and negligence principles.

Whether an enterprise has a reasonable chance of learning about harassment from a particular employee turns on "whether the information comes to the attention of someone who ought by specification of his duties, or failing that, general norms of management to do something about it." *Young*, 123 F.3d at 675. In particular, this inquiry looks to whether the victim complained to another employee who personally had authority to terminate the harassment or who reasonably could be expected to refer the matter to a higher-up who could act on the complaint. *Id.; see also Dickson v. Graham-Jones Paper Co.*, 84 So. 2d 309, 310 (Fla. 1955) (under agency principles, notice to an agent is notice to the principal only when the agent should be expected to communicate the information to the principal and the information that is given to the agent is within the scope of his authority and is communicated to the agent in his official capacity). This approach, which satisfies the reasonable expectations of both victim and employer, is far preferable to a standard that looks only to the confidant's level in the enterprise's hierarchy.

In this case, there are several reasons why Gordon's knowledge should not be imputed to the City. First, the information about the harassment was not communicated to Gordon in his official capacity, nor was it connected to his general responsibilities. As the district court held, "[t]he lifeguards talked to Gordon, not on a subordinate to superior basis, but because of the high repute in which he was held . . . ." Pet. App. 82a. This unchallenged finding makes clear that the comments to Gordon were not intended to be official complaints to a supervisor.

Moreover, there was no evidence that petitioner or any other lifeguard who may have talked to Gordon did so expecting Gordon to relate the discussions to a higher-up

or otherwise to do something about the situation. *See generally* J.A. 131 (Harrington states, "I don't remember complaining to [Gordon], no. I might have mentioned things that were said or happened, but I don't remember formally complaining to him."); J.A. 214 (Faragher states she "talked" to Gordon, in response to question whether she "complain[ed]" to anyone about an incident); J.A. 232, 234 (Nye states that conversations with Gordon were "[n]ot officially like at work. But probably off the job, yeah" and "[i]t wasn't really a complaint. It was more like a comment, I suppose").

As petitioner acknowledges, Gordon left the lifeguards with the clear impression that he would not communicate with the City about their troubles with Terry and Silverman. Gordon was quite blunt in indicating his intent to remain uninvolved; he told the lifeguards that there was "nothing he could do." Pet. Br. 12. In these circumstances, as a matter of law, the City was not on notice of Terry's and Silverman's misconduct by way of Gordon's conversations with Faragher and the other lifeguards. As this Court recognized in *Mutual Life Ins. Co. v. Hilton-Green*, 241 U.S. 613, 623-24 (1916), the general rule of imputing notice to a principal "does not apply when the third party knows there is no foundation for the ordinary presumption—when he is acquainted with circumstances plainly indicating that the agent will not advise his principal." *See also Graves v. Iowa Mut. Ins. Co.*, 132 So. 2d 393, 395 (Fla. 1961) ("[t]he rule that notice to an agent is notice to the principal does not apply when the circumstances are such as to raise a clear presumption that the agent will not transmit his knowledge to his principal").

Finally, the lifeguards knew that Gordon had no authority to terminate the conduct at issue. Gordon was Silverman's peer and then (after Silverman's promotion in 1989) his subordinate, and Gordon at all times worked under Terry, just as Faragher and the other complaining lifeguards did.[37] The simple fact that Gordon took his orders from Terry, and had no supervisory authority over him, demonstrates that notice to Gordon cannot be viewed as notice to the city.

B. The City Cannot Be Held Liable Based Solely On The District Court's Finding Of Pervasiveness Sufficient To Constitute A Hostile Work Environment.

Petitioner argues that the court of appeals erred in holding that the record does not support a finding that the City had constructive knowledge of the harassment. Petitioner is wrong. The court of appeals correctly held that the district court improperly conflated two separate inquiries—whether the complained-of conduct was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'" *Meritor* at 67, and whether the City had constructive knowledge of that hostile work environment. The distinction is important. The former issue focuses on the victim's knowledge and how she views the work environment. The latter focuses on the totality of circumstances from the employer's perspective. A finding that a single employee reasonably perceived her working en-

[37] Gordon testified, "I didn't think it was my place to . . . discipline a supervisor . . . ." Trial Testimony, June 21, 1994, 158. In addition, Gordon acted like a peer when he attended a meeting at Ewanchew's house in 1990 at which the lifeguards and an attorney from the National Organization for Women discussed Terry's and Silverman's conduct and considered their options. *Id.* at 104-05; Trial Testimony, June 22, 1994, 11. Director of Personnel Bender's hope that Gordon would have reported information about the lifeguards' complaints does not magically convert Gordon's knowledge into the City's knowledge. An aspiration that an individual will convey significant information to appropriate authorities when such knowledge comes into his or her possession is not the same as a legal or City-imposed requirement to convey such information. The common law recognizes situations in which the failure to convey information, while appalling under certain circumstances, nonetheless will not result in liability for the ignorant principal where the agent has not violated a pre-existing requirement to convey such information to the principal. *See, e.g., Wyler v. Korean Air Lines Co.*, 928 F.2d 1167, 1171-72 (D.C. Cir. 1991).

vironment as hostile does not mean that the employer automatically should have been aware of the harassment.

Properly recognizing the distinction between the pervasiveness and constructive knowledge inquiries, the court of appeals could have remanded to the district court to apply the proper inquiry. But the court of appeals also permissibly could do what it did do—which was to examine the record independently and conclude as a matter of law that the record would not support a finding that the City should have known about the harassment. *See, e.g., Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501 (1984) ("Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law").

Under a negligence standard, constructive knowledge may be found only when a reasonable employer should have known of the harassment. When the district court properly applied a "reasonable employer" standard in the context of plaintiffs' common-law negligence claims, the court correctly held that the evidence did not support a finding of constructive knowledge.[38] *See* Pet. App. 103a. It was only when the district court applied what it apparently perceived as a conclusive presumption mandated by Title VII precedent—that the pervasiveness analysis applicable to finding that the work environment was abusive is

[38] Not only did the district court find insufficient proof to establish that the City should have become aware of the conduct, but it also questioned even the City's *ability* to be aware of such conduct. Specifically, the district court noted that Beverly Barta—to whom the court assigned the "highest level of credibility"—did not hear others complain about Terry and Silverman. Pet. App. 84a. The district court therefore found that Barta's "lack of awareness of other lifeguards' complaints about Terry and Silverman's conduct casts doubt on the City's ability to be aware of such conduct." *Id.*; *see also* J.A. 228-31 (district court, in ruling on directed verdict motions, expressed serious doubt on how the City could be aware when Barta was not).

the same as the analysis required to show the employer's knowledge—that the court erred. The district court's own finding of lack of constructive knowledge on the common-law negligence claims demonstrates that the court of appeals was correct in concluding as a matter of law that the record does not support the view that the City should have known about Terry's and Silverman's conduct.

The en banc court's opinion recited the record facts on which the court relied in holding that a reasonable employer should not have had such knowledge:

> The lifeguards were stationed at a remote location and had little contact with City officials. The harassment itself occurred intermittently over a long period of time. Faragher worked for the City mostly on a part-time and summer basis, and the district court's holding was premised upon a few, discrete instances of harassment. Another lifeguard, Kelly Evans, was a friend of Faragher's, yet the two never discussed sexual harassment and there is no evidence that Ms. Evans was otherwise aware of Terry's and Silverman's harassing behavior towards Faragher. And, as part of her duties as Recreation Superintendent, Sandy Dioli-Kumm occasionally counseled some of the lifeguards. Ewanchew came to see Dioli-Kumm to discuss work-related issues on several different occasions but never mentioned anything about sexual harassment or offensive words or touching by Terry or Silverman; nor is there any evidence that Dioli-Kumm was otherwise aware of such harassment.
>
> Finally, the district court found that the confined space at the lifeguard headquarters building, along with the disproportionate ratio of female to male lifeguards, were in and of themselves conducive to a sort of camaraderie that might be considered "somewhat boisterous." Despite this, however, Ewanchew stated that the atmosphere in the locker room was generally respectful among members of a particular shift.

Pet. App. 16a-17a. The court of appeals was correct in viewing these facts as insufficient to establish constructive knowledge on the part of a reasonable employer.

C. Negligence Cannot Be Established Solely On The Basis Of An Employer's Failure To Disseminate Its Sexual Harassment Policy.

Contrary to petitioner's suggestion that the City should be found liable under a negligence standard for failure to distribute its written sexual harassment policy, the court of appeals correctly recognized that the evidence cannot support a finding of constructive knowledge on this basis. Courts correctly have recognized that an employer's failure to establish or disseminate a strong anti-harassment policy does not alone support a finding of negligence. *See, e.g., Bouton*, 29 F.3d at 109 ("The lack of a separate, written grievance policy for sexual harassment is not dispositive."); *Foster v. Township of Hillside*, 780 F. Supp. 1026, 1041 (D.N.J.), *aff'd mem.*, 977 F.2d 567 (3d Cir. 1992); *Linson v. Trustees of the Univ. of Pa.*, No. 95-3681, 1996 U.S. Dist. LEXIS 12243, at *33-35 (E.D. Pa. Aug. 21, 1996) (Title IX case). Under a negligence standard, the proper inquiry is whether a "reasonable employer" would have distributed a policy and would have learned of the harassment and taken remedial action after having done so.[39] Among other things, this inquiry requires consideration of the guidance employers had in the mid- to late-1980s concerning the duty to promulgate sexual harassment policies, the actual frequency with

[39] Here, the record shows that the City's failure to disseminate its policy effectively to Marine Safety Section employees was unconnected to the City's lack of knowledge. As the court of appeals observed, "[t]he district court did not find that the City would have known about the harassment if it had effectively disseminated this policy; and indeed, the record indicates that failure to disseminate this policy was not the reason why the City did not know about the harassment." Pet. App. 17a n.11.

When Faragher read the revised sexual harassment policy in May 1990, she did not come forward with any complaint despite the policy's explicit urging that employees report offending conduct. Trial Testimony, June 22, 1994, 213-15; J.A. 188, 269-72.

which policies were distributed at that time, and enforcement of such policies.[40]

There simply is no duty imposed by statute or otherwise for an employer to have a disseminated sexual harassment policy. Certainly up until 1990, employers had little guidance from the EEOC about efficacious anti-harassment programs. It was not until March 1990 that the EEOC announced that "[a]n effective preventative program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented." EEOC Policy Guidance on Sexual Harassment, 8 Fair. Empl. Prac. Manual (BNA) 405:6681, 6699 (Mar. 19, 1990).[41] Petitioner suggests that the City had a "minimum" duty of "reasonable care" to develop "a vigorous prevention program and an effective enforcement mechanism." Pet. Br. 39-40 (footnotes omitted). But even two years after the last conduct here, many employers remained unaware of any such duty: a 1992 survey of businesses found that less than half of the responding companies had a sexual harassment policy, and a third had not "even thought about" formulating a policy. Christopher Caggiano, *"What Are You Doing About Sexual Harassment?,"* Inc., Aug. 1992, at 16.[42]

[40] The EEOC's own December 1985 brief to the Court in *Meritor* suggested that an employer that lacked an expressed policy against sexual harassment should be liable for hostile-environment harassment only "if it has actual knowledge of the harassment or if, considering all the facts of the case, the victim in question had no reasonably available avenue for making his or her complaint known to appropriate management officials." Brief for United States and EEOC as *Amici Curiae* in *Meritor* (No. 84-1979) at 26.

[41] The EEOC's 1990 policy guidance also provided concrete details on the EEOC's view of the appropriate design of procedures for resolving sexual harassment complaints. Prior to that time, EEOC regulations adopted in 1980 simply advised employers to "take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment . . . ." 29 C.F.R. § 1604.11(f).

The misconduct generating the claims here occurred from 1985 until April 1990, before the Civil Rights Act of 1991 was passed. As soon as the City became aware of the allegations, it took prompt action to remedy the problem. When faced with an employer in a similar situation, this Court noted that "[t]he law then in effect imposed no liability on an employer who corrected discriminatory work conditions before the conditions became so severe as to result in the victim's constructive discharge." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 282 n.35 (1994). In that context, this Court noted the unfairness of applying the 1991 Act's damages provisions to employers retroactively.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

FRANK BARTOLONE
City Attorney
THE CITY OF BOCA RATON
201 West Palmetto Park Road
Boca Raton, FL 33432

HARRY A. RISSETTO
PETER BUSCEMI
Counsel of Record
MARK S. DICHTER
MARK A. SRERE
VICTORIA E. HOUCK
MORGAN, LEWIS &
BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190
Counsel for Respondent
The City of Boca Raton

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